Etiqa Family Takaful Bhd (previously known as Etiqa Takaful Bhd) v Ketua Pengarah Hasil Dalam Negeri and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(A)-726–09 OF 2022 AND W-01(A)-746–10 OF 2022
AZIZAH NAWAWI, SEE MEE CHUN AND LIM CHONG FONG JJCA
28 NOVEMBER 2024

Revenue — Income tax — Appeal against additional assessment — Commission expenses incurred by taxpayer in shareholders fund to earn wakalah fee from general takaful fund — Whether commission expenses deductible under s 33(1) of ITA — Whether Director General of Inland Revenue ('Revenue') successfully discharged its burden of proof under s 91(3) of ITA — Whether there was factual or legal basis for Revenue to impose penalty against taxpayer under s 113(2) of ITA — Income Tax Act 1967 ss 33, 91(3) & 113(2)

Etiqa Family Takaful Bhd ('taxpayer') was in the principal business of managing the general and family takaful business. The Director General of Inland Revenue ('Revenue') raised notices of additional assessment for year of assessment ('YA') 2008 to 2013 with additional tax payable and penalties. The taxpayer being aggrieved by the Revenue's decision filed notices of appeal for the YAs in question. The Special Commissioners of Income Tax held that: (a) the commission expenses on the wakalah fee could not be deducted as the expenses of the shareholders fund under s 33 of the Income Tax Act 1967 ('ITA'); and (b) the taxpayer was negligent within the meaning of s 91(3) of the ITA and the Revenue was right in imposing the penalties under s 113(2) of the ITA. The taxpayer's appeal was disallowed and an appeal to the High Court ('HC') ensued. The HC found that: (i) the commission expenses incurred by the appellant in the shareholders' fund for the YAs 2008 to 2013 to earn the wakalah fee from the general takaful fund were not deductible as the expenses of the shareholders' fund under s 33 of the ITA; and (ii) in the absence of any proof of intentional wrongdoing on the taxpayer's part the Revenue had not successfully discharged its burden of proof under s 91(3) of the ITA. There was no legal basis for the Revenue to exercise his discretion in imposing a penalty against the taxpayer under s 113(2) of the ITA for the YAs 2008 to 2013. The HC dismissed the appeal for YAs 2011, 2012 and 2013; and allowed the appeal for YAs 2008, 2009 and 2010 on the basis that the said assessments were time-barred under s 91(3) of the ITA. Hence, Appeal 726 by the taxpayer and Appeal 746 by the Revenue against the decision of the HC.

Held, dismissing the appeals:

(1) **(per See Mee Chun JCA, majority)** The shoulder note to s 33 of the ITA read 'adjusted income generally'. The shoulder note to s 60AA of the ITA stated 'Takaful business' such that it could not be gainsaid that it was a specific provision dealing with takaful business. The only items allowed to be deducted of the shareholders fund were those specified in s 60AA(9)(b) which did not include commission expenses. Since s 60AA(9)(b) of the ITA was the specific provision dealing with takaful business and the taxability thereof, it followed that this being a specific provision, prevailed over the general provision of s 33(1) of the ITA. Section 52 of the ITA showed it could allow s 33(1) to apply in which case, s 33(1) had to be modified. Section 52 of the ITA further stated that if there was any inconsistency between s 60AA(9) and s 33(1), s 33(1) as modified, shall be void to the extent of that inconsistency. Any modification of s 33(1) would give rise to an inconsistency of provisions and rendered s 33(1) when modified, void to the extent of that inconsistency. Thus, s 52 of the ITA did not assist the taxpayer. The principle of *generalia specialibus non derogant* still applied. There was already in s 60AA(9)(b) of the ITA what was to be deducted. Hence it could not be argued that there could be a claim for commission expenses to be deducted under s 33(1) as s 60AA(9) did not prohibit it or that s 33(1) did not expressly preclude it. Thus, the commission expenses incurred by the taxpayer in the shareholders fund for YAs 2008 to 2013 to earn the wakalah fee from the general takaful fund were not deductible as the expenses of the shareholders fund under s 33(1) of the ITA (see paras 18–19, 33, 41, 43 & 50–51).

(2) **(per See Mee Chun JCA, majority)** The notices of additional assessment were issued beyond five years from YAs 2008 to 2010. Section 91(1) of the ITA allows such additional assessment to be made within five years. However, where there had been fraud, wilful default or negligence on the part of the taxpayer, such assessment may be made at any time. The taxpayer was not negligent and the Revenue had not successfully discharged its burden of proof under s 91(3) of the ITA in relation to the notices of additional assessment for YAs 2008 to 2010. Given the finding on s 91(3) of the ITA, the penalty under s 113(2) of the ITA was incorrectly imposed (see paras 53, 66 & 68).

(3) **(per Lim Chong Fong JCA, dissenting)** If Legislature had intended to exclude s 33 of the ITA, this would have been specifically expressed in the ITA itself and in consonance with s 52 of the ITA. There was no such express exclusion seen in s 60AA of the ITA. The Revenue's contention that the provisions in s 60AA of the ITA overrode the general provision in s 33(1) of the ITA based on the principle generalia specialibus non derogant was fallacious. The insertion of s 60AA(9) of the ITA via the Finance Act 2013 was merely to expressly put to rest the availability of the right of the taxpayer to treat commission expenses paid to generate the

wakalah fee income but not to add a right to the arguable non-availability of that right in the pre-amended s 60A of the ITA. Thus, Appeal 726 was allowed and Appeal 746 was dismissed (see paras 87–90 & 93).

[Bahasa Malaysia summary

Etiqa Family Takaful Bhd ('pembayar cukai') menjalankan perniagaan utama menguruskan perniagaan takaful am dan keluarga. Ketua Pengarah Hasil Dalam Negeri ('Hasil') mengeluarkan notis taksiran tambahan untuk tahun taksiran ('YA') 2008 hingga 2013 dengan cukai tambahan yang perlu dibayar dan penalti. Pembayar cukai, yang tidak berpuas hati dengan keputusan Hasil, memfailkan notis rayuan untuk YA yang dipersoalkan. Pesuruhjaya Khas Cukai Pendapatan memutuskan bahawa: (a) perbelanjaan komisen ke atas yuran wakalah tidak boleh ditolak sebagai perbelanjaan dana pemegang saham di bawah s 33 Akta Cukai Pendapatan 1967 ('ACP'); dan (b) pembayar cukai cuai mengikut maksud s 91(3) ACP dan Hasil berhak mengenakan penalti di bawah s 113(2) ACP. Rayuan pembayar cukai ditolak dan rayuan ke Mahkamah Tinggi ('MT') kemudiannya dibuat. MT mendapati bahawa: (i) perbelanjaan komisen yang ditanggung oleh perayu dalam dana pemegang saham bagi YA 2008 hingga 2013 untuk memperoleh yuran wakalah daripada dana takaful am tidak boleh ditolak sebagai perbelanjaan dana pemegang saham di bawah s 33 ACP; dan (ii) tanpa sebarang bukti salah laku sengaja daripada pihak pembayar cukai, Hasil tidak berjaya memenuhi beban pembuktian di bawah s 91(3) ACP. Tiada asas perundangan bagi Hasil untuk menggunakan budi bicaranya dalam mengenakan penalti ke atas pembayar cukai di bawah s 113(2) ACP bagi YA 2008 hingga 2013. MT menolak rayuan bagi YA 2011, 2012 dan 2013; dan membenarkan rayuan bagi YA 2008, 2009 dan 2010 atas alasan bahawa taksiran tersebut telah tamat tempoh di bawah s 91(3) ACP. Oleh itu, Rayuan 726 oleh pembayar cukai dan Rayuan 746 oleh Hasil terhadap keputusan MT.

Diputuskan, menolak rayuan-rayuan:

(1) **(oleh See Mee Chun HMR, majoriti)** Nota pada s 33 ACP berbunyi 'pendapatan larasan secara amnya'. Nota pada s 60AA ACP menyatakan 'perniagaan Takaful' sehinggakan tidak dapat dinafikan bahawa ia adalah peruntukan khusus yang berkaitan dengan perniagaan takaful. Hanya item yang dibenarkan ditolak daripada dana pemegang saham adalah seperti yang dinyatakan dalam s 60AA(9)(b), yang tidak termasuk perbelanjaan komisen. Oleh kerana s 60AA(9)(b) ACP merupakan peruntukan khusus yang berkaitan dengan perniagaan takaful dan kebolehcukaiannya, maka peruntukan khusus ini mengatasi peruntukan am s 33(1) ACP. Seksyen 52 ACP menunjukkan ia membenarkan s 33(1) untuk diguna pakai, di mana s 33(1) perlu dipinda. Seksyen 52 ACP selanjutnya menyatakan bahawa sekiranya terdapat sebarang percanggahan antara s 60AA(9) dan s 33(1), s 33(1) yang dipinda, adalah

terbatal setakat ketidaklarasan tersebut. Sebarang pindaan terhadap s 33(1) akan menimbulkan percanggahan peruntukan dan menjadikan s33(1) apabila dipinda, terbatal setakat ketidaklarasan tersebut. Oleh itu, s 52 ACP tidak membantu pembayar cukai. Prinsip *generalia specialibus non derogant* masih terpakai. Seksyen 60AA(9)(b) ACP telahpun menyatakan apa yang perlu ditolak. Oleh itu, tidak dapat dihujahkan bahawa terdapat tuntutan untuk perbelanjaan komisen ditolak di bawah s 33(1) kerana s 60AA(9) tidak melarangnya atau s 33(1) tidak secara nyata menghalangnya. Oleh itu, perbelanjaan komisen yang ditanggung oleh pembayar cukai dalam dana pemegang saham bagi YA 2008 hingga 2013 untuk memperoleh yuran wakalah daripada dana takaful am bukanlah ditolak sebagai perbelanjaan dana pemegang saham di bawah s 33(1) ACP (lihat perenggan 18–19, 33, 41, 43 & 50–51).

(2) **(oleh See Mee Chun HMR, majoriti)** Notis taksiran tambahan telah dikeluarkan melebihi tempoh lima tahun daripada YA 2008 hingga 2010. Seksyen 91(1) ACP membenarkan taksiran tambahan dibuat dalam tempoh lima tahun. Walau bagaimanapun, sekiranya terdapat penipuan, kecuaian sengaja atau kecuaian daripada pihak pembayar cukai, taksiran tersebut boleh dibuat pada bila-bila masa. Pembayar cukai tidak cuai dan Hasil tidak berjaya memenuhi beban pembuktian di bawah s 91(3) ACP berhubung dengan notis taksiran tambahan bagi YA 2008 hingga 2010. Berdasarkan penemuan terhadap s 91(3) ACP, penalti di bawah s 113(2) ACP telah dikenakan secara salah (lihat perenggan 53, 66 & 68).

(3) **(oleh Lim Chong Fong HMR, menentang)** Sekiranya badan perundangan berhasrat untuk mengecualikan s 33 ACP, ia akan dinyatakan secara khusus dalam ACP sendiri dan selaras dengan s 52 ACP. Tiada pengecualian nyata yang dilihat dalam s 60AA ACP. Hujahan Hasil bahawa peruntukan dalam s 60AA ACP mengatasi peruntukan am dalam s 33(1) ACP berdasarkan prinsip generalia specialibus non derogant adalah tidak berasas. Penambahan s 60AA(9) ACP melalui Akta Kewangan 2013 hanyalah untuk secara jelas menamatkan ketersediaan hak pembayar cukai untuk mengurus perbelanjaan komisen yang dibayar untuk menjana pendapatan yuran wakalah, tetapi bukan untuk menambah hak kepada ketidaksediaan hak yang boleh dipertikaikan dalam s 60A ACP yang dipinda sebelum ini. Oleh itu, Rayuan 726 dibenarkan dan Rayuan 746 ditolak (lihat perenggan 87–90 & 93).]

Cases referred to

Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428; [2005] 2 MLRA 335, CA (refd)

Fernrite Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2004] 7 MLJ 600, HC (refd)

Gedir v Revenue and Customs Comrs [2016] UKFTT 188 (refd)
Ketua Pengarah Hasil Dalam Negeri v CIMB Group Holdings Bhd [2024] MLJU 1114, HC (refd)
Ketua Pengarah Hasil Dalam Negeri v Tune Insurance Berhad (W-01(A)-308–06 of 2019) (unreported)> (refd)
Keysight Technologies Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2024] MLJU 1271, CA (folld)
Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd [2014] 2 MLJ 1; [2014] 3 CLJ 421, FC (refd)
Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307; [2009] 6 CLJ 405, FC (refd)
NV Alliance Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2012] 1 MLJ 441, CA (refd)
Opus International (M) Berhad v Ketua Pengarah Hasil Dalam Negeri [2019] MLJU 598, HC (refd)
Piramid Intan Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2015] 10 MLJ 436, HC (refd)
Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721; [2024] 4 MLRA 394, FC (refd)
The Great Eastern Life Assurance Co Ltd v Director General of Inland Revenue [1987] 2 MLJ 529, PC (refd)
Tune Insurance Malaysia Berhad v Ketua Pengarah Hasil Dalam Negeri [2019] MLJU 933, HC (refd)

Legislation referred to

Finance Act 2007
Finance Act 2013
Finance Act 2014
Income Tax Act 1967 ss 3, 4, 33, 33(1), 34(8), 34A(5), 34B(3), 34C(2), 38(5), 52, 60, 60(5)(b)(i), 60AA, 60AA(1), (9), 60AA(9)(b), (9)(b)(i), (9)(b)(ii), (9)(b)(iii), (9)(b)(iv), 60F, s 60F(2), 60H(6), 65E(12), 91(3), 113(2), Part III, Chapters 3, 8
Interpretation Acts 1948 and 1967 s 17A
Rules of the High Court 1980 (repealed by Rules of Court 2012)

Appeal from: *Etiqa Family Takaful Bhd (dahulunya dikenali sebagai Etiqa Takaful Bhd) v Ketua Pengarah Hasil Dalam Negeri* [2022] MLJU 2882 (High Court, Kuala Lumpur)

S Saravana Kumar (with Yap Wen Hui) (Rosli Dahlan Saravana Partnership) in Civil Appeal No W-01(A)-726–09 of 2022 for the appellant.
Ashrina bt Ramzan Ali (with Surani bt Che Ismail) (Inland Revenue Board of Malaysia) in Civil Appeal No W-01(A)-726–09 of 2022 for the respondent.

Ashrina bt Ramzan Ali (with Surani bt Che Ismail) (Inland Revenue Board of Malaysia) in Civil Appeal No W-01(A)-746–10 of 2022 for the appellant.
S Saravana Kumar (with Yap Wen Hui) (Rosli Dahlan Saravana Partnership) in Civil Appeal No W-01(A)-746–10 of 2022 for the respondent.

See Mee Chun JCA (delivering majority judgment of the court):

INTRODUCTION

[1] There are two appeals being heard together. Appeal 726 is the appeal of Etiqa Family Takaful Bhd ('taxpayer') against the decision of the High Court ('HC') dismissing its appeal for year of assessment ('YA') 2011, 2012 and 2013. Appeal 746 is the appeal by the Director General of Inland Revenue ('Revenue') against the decision of the HC in allowing the taxpayer's appeal for YAs 2008, 2009 and 2010.

[2] The taxpayer is in the principal business of managing the general and family takaful business. From 1 December 2007, the taxpayer also commenced managing takaful investment-linked business upon the transfer of the takaful assets, liabilities and business of Maybank Takaful Bhd to it.

BACKGROUND FACTS

[3] The Revenue raised notices of additional assessment (Form JA) for YAs 2008 to 2013 with additional tax payable and penalties as set out below:

Date	YA	Additional assessment including penalties
18 July 2016	2008	RM2,624,936.97
30 December 2016	2009	RM3,589,065.87
30 December 2016	2010	RM6,279,723.89
27 December 2016	2011	RM10,383,369.25
28 December 206	2012	RM26,007,964.73
28 December 2016	2013	RM26.810,914.96

The taxpayer being aggrieved by the Revenue's decision filed notices of appeal (Form Q) for the YAs in question.

[4] On 19 February 2021, the Special Commissioners of Income Tax

('SCIT') disallowed the taxpayer's appeal. An appeal to the HC ensued. On 14 September 2022, the HC allowed in part the taxpayer's appeal.

DECISION OF THE HC

[5] The grounds of judgment ('GOJ') of the HC judge dated 15 November 2022 is to be found in encl 27/10–25.

[6] The HCJ dealt with the first issue of whether the SCIT was right in holding that the commission expenses on the *wakalah* fee could not be deducted as the expenses of the shareholders fund under s 33 of the Income Tax Act 1967 ('the ITA'). It was accepted in para 27 that the taxpayer must have incurred the commission expenses paid to the takaful agents but the question was whether s 33(1) of the ITA automatically applies.

[7] The HCJ had no problem accepting the taxpayer's submission that s 33(1) of the ITA is a basket provision where all outgoings and expenses exclusively incurred in the production of gross income are tax deductible (paras 28 and 32). In the same para 32, the HCJ posed the real question to be 'will this basket provision cover the commission expenses in the context of a Takaful business' to which the HCJ answered 'I do not think so'.

[8] This was next stated in paras 33, 34 and 35:

> [33] The learned SRC submitted that the ITA treats the takaful business as a separate and distinct business. It is for this reason, according to the learned SRC, that Parliament inserted s 60AA of the ITA to deal with the specific business of a takaful operator. Thus, the issue of the allowable expense of a takaful operator must be construed in light of the purpose and intention behind the specific provisions contained in s 60AA of the ITA that governs the takaful business.
>
> [34] I find merits in this line of argument. If indeed s 33(1), the so-called basket provision, is sufficient to cover the commission expenses incurred by the appellant, why is the necessity for Parliament to enact s 60AA of the ITA in the first place? It is trite that Parliament is assumed to know the law that it enacts. Parliament does not act in vain by legislating for the sake of legislating.
>
> [35] I find support in the said proposition in the judgment of Abdoolcader SCJ in *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 (SC), who held that:
>
> > The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded.

[9] The HCJ then went to consider whether the SCIT had correctly concluded that the taxpayer was negligent within the meaning of s 91(3) of the ITA. It was noted in para 38 that the taxpayer's returns were filed within the statutorily prescribed time and the documents requested by the Revenue were duly provided despite the tax audit being conducted six years upon the expiration of YAs 2008 to 2010. The HCJ found the only fault, if at all, of the taxpayer to be the different interpretation of the law which was an erroneous impression but a reasonable one. It was concluded at para 41:

> [41] With respect, a reasonably different interpretation of the relevant provisions in the ITA can hardly be held as negligence within the meaning of s 91(3) of the ITA. There is nothing in the notes of proceedings that shows that there was a breach of the duty of care on the part of the appellant.

[10] Accordingly, the SCIT was found to have erred in concluding that the taxpayer was negligent and that the Revenue had not successfully discharged its burden of proof under s 91(3) of the ITA in relation to the notices of additional assessment for YAs 2008 to 2010.

[11] For the same reason under s 113(2) of the ITA, the SCIT had erred in concluding the Revenue was right in imposing the penalties.

[12] In para 45, the findings of the HC were as follows:

> [45] For the reasons aforesaid, the finding of this court is as follows:
>
> (a) the commission expenses incurred by the appellant in the shareholders' fund for the YAs 2008 to 2013 to earn the wakalah fee from the general takaful fund are not deductible as the expenses of the shareholders' fund under s 33 of the ITA; and
>
> (b) in the absence of any proof of intentional wrongdoing on the appellant's part the DGIR had not successfully discharged its burden of proof under s 91(3) of the ITA. There was no legal basis for the DGIR to exercise his discretion in imposing a penalty against the appellant under s 113(2) of the ITA for the YAs 2008 to 2013.

ORDER OF THE HC

[13] The order of the HC is to be found in encl 27/30–32:

> ... HEREBY ORDERED that:
>
> (1) The Appellant's appeal in relation to the Notice of Additional Assessment ('Form J A') for the year of assessment ('YA') 2008 dated 18.7.2016, Form JA for the YA 2009 dated 30.12.2016 and Form JA for the YA 2010 dated 30.12.2016 is allowed on the basis that the said assessments are time-barred under Section 91(3) of the Income Tax Act 1967 ('ITA');

(2) The Appellant's appeal regarding the penalty imposed by the Respondent under Section 113(2) of the ITA in relation to Form JA for the YA 2008 dated 18.7.2016, Form JA for the YA 2009 dated 30.12.2016 and Form JA for the YA 2010 dated 30,12,2016 is allowed as a whole;

OUR DECISION

[14] At the start of proceedings, we were informed that in the order of the HC, the taxpayer's appeal regarding the penalty was only allowed for YAs 2008, 2009 and 2010. However, in the GOJ, the finding was one of no basis for the imposition of penalties for YAs 2008 to 2013. Parties were directed to proceed on the basis of the order.

APPEAL 726 BY THE TAXPAYER

Whether commission expenses are deducted under s 33(1) of the ITA

[15] The sole issue to be decided in Appeal 726 is whether the commission expenses incurred by the taxpayer in the shareholders fund for YAs 2008 to 2013 to earn the wakalah fee from the General Takaful Fund are deductible as the expenses of the shareholders fund under s 33(1) of the ITA.

[16] The determination of this issue would also require a consideration of s 60AA(9) of the ITA. For ease of reference, we now set out ss 33(1) and 60AA(1) and (9).

33 Adjusted income generally

(1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period ail outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including ...

60AA Takaful Business

(1) This section shall apply for ascertaining the adjusted income for the basis period for a year of assessment from the takaful business of an operator.

...

(9) The adjusted income of the *shareholders' fund*, for the basis period for a year of assessment of a takaful operator resident for the basis year for that year of assessment shall be ascertained by —

(a) *taking the aggregate of* —

...

(b) *deducting from that aggregate* —

(i) where subparagraph (a)(ii) is applicable for that period to gross proceeds receivable in connection with any investment or right, the

A cost of acquiring and realizing the investments or rights;

(ii) so much of the amount of *qard* incurred in that period in connection with the family fund;

(iii) the amount of management expenses incurred by him in that period in
B connection with his family and general businesses. (Emphasis added.)

With regard to s 60AA(1) and (9), the legal provision is as it stood at the relevant time since there were subsequent amendments.

C **[17]** The details and the amount of the commission expenses incurred by the taxpayer are not in dispute. The HCJ noted in para 17 GOJ that the Revenue through its witness RW1 did not dispute that commission fees were incurred by the taxpayer to earn the wakalah fee. The HCJ had in para 27 also accepted that the taxpayer must have incurred the commission expenses paid to the
D takaful agents.

Section 33(1) vis a vis s 60AA(9)

[18] The shoulder note to s 33 reads 'adjusted income generally'.

E

[19] The shoulder note to s 60AA states 'Takaful business' such that it cannot be gainsaid that it is a specific provision dealing with takaful business. Further, it appears under Chapter 8 on special cases. Then comes sub-s (9) where it provides that the adjusted income of the *shareholders' fund* shall be
F ascertained by taking the *aggregate amount* of specified items *deducting* from that aggregate specified items'. (Emphasis added.) The only items allowed to be deducted of the shareholders fund are those specified in sub-s 60AA(9)(b) which are three items, namely cost of acquisition and realising of investment, *qard* and management expenses. It clearly does not
G include commission expenses.

[20] That was the prevailing law then as at YA2008 and the ensuing years until YA2014. The YAs in question for this appeal are for 2008 to 2013.

H

[21] Section 60AA was inserted by Finance Act 2007 (Act 683). Its intention can be seen in the explanatory statement ('ES') to the Bill as follows:

12. Clause 15 seeks to amend section 60AA of Act 53 *to provide for the specific provisions for ascertaining the taxability of takaful business* which comprises of family
I solidarity business, general business, inward re-takaful business, offshore takaful business and re-takaful business. The proposed amendment also seeks to address syariah compliance requirements such as the payment of wakalah fee paid by participants to the takaful operator for managing the takaful funds, the distribution of profits to participants in accordance with the mudharabah model, the treatment on qard paid by the operator and the management fees incurred by the operator.

This amendment has effect for the year of assessment 2008 and subsequent years of assessment. (Emphasis added.)

[22] It will be clear that the intention was to have a specific provision to ascertain the taxability of takaful business and to address syariah compliance requirements. Parliament's intention then was to treat takaful business as a separate and distinct business vide s 60AA. It is this provision that one turns to when dealing with takaful business rather than to s 33(1).

[23] Section 60AA is to be construed in a manner that would promote the purpose or object underlying it. This would accord with s 17A of the Interpretation Acts 1948 and 1967 which provides that:

17A Regard to be had to the purpose of Act

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[24] The purposive approach behind a taxing law has also been accepted by our courts. In *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd* [2014] 2 MLJ 1; [2014] 3 CLJ 421 (FC), it was said as follows at p 11 (MLJ); p 433 (CLJ):

[20] After tracing the history of how courts treat the interpretation of taxing Acts, culminating with the promulgation of s 17A of the Interpretation Acts 1948 and 1967 and subsequent cases, *the purposive approach is here to stay. The intention of Parliament therefore cannot be discounted even if the matter in the Act pertained to taxing issues*. (Emphasis added.)

[25] In para 19 of the same case, it was also stated:

[19] In *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd* [2005] 3 MLJ 97; [2004] 2 CLJ 265, Steve Shim CJSS when discussing s 17A of the Interpretation Acts 1948 and 1967, *enjoined the purposive approach to statutory interpretation, in that it equally applied to taxing statutes*. His Lordship in no uncertain terms said:

The duty of a court is, in my opinion, in all cases the same; whether the Act to be construed relates to taxation or any other subject, viz to give effect to the intention of Legislature. (Emphasis added.)

[26] Taking the taxpayer's contention that s 33(1) of the ITA is a basket provision where all outgoings and expenses exclusively incurred in the production of gross income, and that it covers commission expenses; the question still arises as to why was it necessary for Parliament to enact s 60AA

vide Finance Act 2007. The HCJ was correct to have seen the issue in that context.

[27] If it is not clear enough that s 60AA(9)(b) would be the definitive section on allowable expenses for a takaful business operator for which commission expenses are not deductible, s 60AA(9)(b) was subsequently amended to insert a new sub-para s 60AA(9)(b)(iv) to allow for such deduction. This amendment was done through Finance Act 2014 (Act 761).

[28] Section 60AA(9)(b) with the original (i), (ii) and (iii) and the newly inserted (iv) in bold, is set out as follows:

> (b) deducting from that aggregate —
>
> (i) where subparagraph (a)(ii) is applicable for that period to gross proceeds receivable in connection with any investment or right, the cost of acquiring and realizing the investments or rights;
>
> (ii) so much of the amount of *qard* incurred in that period in connection with the family fund;
>
> (iii) the amount of management expenses incurred by him in that period in connection with his family and general business; and
>
> (iv) ***commission payable and discounts allowed by him in that period in connection with his family and general business***

The amendment was from YA2014.

[29] It follows that if the then unamended s 60AA(9)(b)(i), (ii) and (iii) allowed the deduction of commission expenses, there would be no necessity to insert sub-para (iv) to now again allow it. If indeed Parliament had the intention to allow the deduction of commission expenses before YA2014, it would have done so earlier in Finance Act 2007 when it introduced the specific provision to ascertain the taxability of takaful business for YA2008 onwards.

[30] We refer to the ES to the Bill enacting Finance Act 2014 explaining the rationale for the amendment:

> 12 ...
>
> Clause 16 further *seeks to insert sub subparagraphs 60AA(9)(b)(iv)* and (10)(b)(iv) into Act 53 *to provide that commission payable* or discounts allowed by the operator in connection with the operator's general business *is allowed as a deduction* in arriving at the adjusted income of the operator.
>
> *These amendments have effect for the year of assessment 2014 and subsequent years of assessment*. (Emphasis added.)

[31] This time, the intention was to provide that commission expenses are allowed to be deducted. A

[32] Parliament certainly does not act in vain and is presumed to know the law it enacts. It did not act in vain in enacting Finance Act 2007 and Finance Act 2014 with regard to takaful business and what was allowed to be deducted. B

Principle of generalia specialibus non derogant

[33] Having found that s 60AA(9)(b) is the specific provision dealing with takaful business and the taxability thereof, it follows that this being a specific provision, prevails over the general provision of s 33(1). C

[34] For the principle of *generalia specialibus non derogant* and its application we refer to *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307; [2009] 6 CLJ 405 as follows: D

> [16] ... it is evident that the Rules Committee *had intended to establish a specific framework* for the determination of applications for judicial review. In my view O 53 of the RHC was specifically drafted for that purpose. ... *As a specific rule was put in place for judicial review proceedings, the more general basis for intervention under O 15 r 6(2)(b) of the RHC cannot be invoked. The maxim 'generalia specialibus non derogant' would apply*. (Emphasis added.) E

[35] Although this was a judicial review matter under the then Rules of the High Court 1980, we find there is no good reason why the principle of a specific provision prevailing over a general provision cannot apply equally in a tax legislation. This is all the more so when the purposive approach behind tax legislation has been accepted. F

Application of s 52 G

[36] It was the taxpayer's contention that the principle of *generalia specialibus non derogant* does not apply due to s 52 of the ITA.

[37] The aforesaid provision states as follows: H

> 52 Modification of Part III in certain special cases
>
> *In a case where any provision of this Chapter applies, the foregoing Chapters shall also apply but shall be modified* in their application to the extent necessary to conform with that provision; *and, if in that case there is any inconsistency between that provision and any provision of the foregoing Chapters, that provision of those Chapters shall be void to the extent of the inconsistency*. (Emphasis added.) I

[38] We turn to the arrangement of sections under which Part III of the ITA is to be found and the various Chapters under it:

ARRANGEMENT OF SECTIONS

PART III

ASCERTAINMENT OF CHARGEABLE INCOME

...

Chapter 3 — *Gross income*

...

33. Adjusted income generally

...

Chapter 8 — Special cases

52. Modification of Part III in certain special cases

...

60AA. Application of section 60 and 60A to a *takaful* business

[39] Section 33 is in Chapter 3 and s 60AA is in Chapter 8, and both sections are in Part III. The taxpayer submitted that s 52 enables s 33, being in the foregoing Chapter, to apply over that of s 60AA. Reference was made to the Privy Council in *The Great Eastern Life Assurance Co Ltd v Director General of Inland Revenue* [1987] 2 MLJ 529 which found that there was no inconsistency between s 60 on insurance with the general provisions of ss 3 and 4, and thus these ss 3 and 4 were applicable. At pp 531–532 this was stated:

> The Special Commissioners dealt with the argument very simply. Section 60, in their view, was not concerned with chargeability to tax but merely with the computation of the adjusted income upon which tax is to be charged. ... There is no inconsistency between s 60 and ss 3 and 4, the former being merely concerned with the method of computation of the income chargeable to tax under the latter.

[40] Applying the above principle, there being no inconsistency in the present matter, it was submitted that the taxpayer should be allowed to claim a tax deduction on the commission expenses under s 33(1).

[41] A reading of s 52 shows it can allow s 33(1) to apply in which case, s 33(1) has to be modified. Section 52 further states that if there is any inconsistency between 'that provision' which, on the facts, is s 60AA(9) and 'any provision of the foregoing Chapter' which is s 33(1), s 33(1) as modified, shall be void to the extent of that inconsistency. We have earlier found that s 33(1) is a general provision and s 60AA is a specific provision for takaful business. Therefore, any modification of s 33(1) will give rise to an inconsistency of provisions and renders s 33(1) when modified, void to the extent of that inconsistency. In this regard, s 52 does not assist the taxpayer.

[42] This contrasts with *The Great Eastern Life Assurance Co Ltd* where there was found to be no inconsistency. A

[43] It follows that the principle of *generalia specialibus non derogant* still applies. B

[44] The next case referred to by the taxpayer was *Fernrite Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2004] 7 MLJ 600 that s 33(1) can apply to an investment holding company to which s 60F applies. At pp 625 and 627 it was stated: C

> [64] ... It is patent that the learned Special Commissioners misdirected themselves:
>
> ...
>
> (3) Third, the deduction s 33(1) of the Act applies to all sources of income and, thus, the learned Special Commissioners cannot reject the Appellant's arguments as above. D
>
> (b) Thus, expenses not deductible under s 33 are allowed under s 60F upon the formula as above and in respect of defined expenses. Expenses falling under s 33 of the Act are still allowable under that section.

E

[45] One must not lose sight that s 60F(2) provided that 'permitted expenses' are as defined and which are not deductible under s 33(1). That was what was meant by 'thus expenses not deductible under s 33 are allowed under s 60F'. Therefore, s 60F is the specific provision relating to an investment company and how the permitted expenses are to be treated. F

[46] In any event, s 52 was not raised.

[47] A further case referred to was *Tune Insurance Malaysia Berhad v Ketua Pengarah Hasil Dalam Negeri* [2019] MLJU 933. Here s 52 was mentioned and the issue was whether expenses for provision of risk margin for adverse deviation ('PRAD') are deductible under ss 33(1) and 60(5)(b)(i). At paras 20 and 21, the following was said: G

> 20. Here, there is nothing under this provision that precludes the application of s 33(1) and I agree with the applicant's contention that s 60(5)(b)(i) supplements and applies over and above s 33(1). This too is consistent with s 52 of the ITA 1967 which states: ... H
>
> 21. In the circumstances, s 60(5)(b)(i) and s 33(1) of ITA 1967 are applicable in relation to this issue of deduction of PRAD expenses. I

[48] Although reference was made to s 52, the High Court did not appear to consider the requirement of inconsistency. This is made clear in the subsequent para 22 where the provisions of ss 33(1) and 60(5)(b)(i) are said to have similar

conditions. Paragraph 20 states the following:

> 20. Here, there is nothing under this provision that precludes the application of s 33(1) and I agree with the applicant's contention that s 60(5)(b)(i) supplements and applies over and above s 33(1). This too is consistent with s 52 of the ITA 1967 which states: ...

That s 60AA(9)(b) does not preclude s 33(1)

[49] The taxpayer's submission was that s 60AA(9)(b) does not exclude the application of s 33(1) and neither does s 33(1) expressly preclude such deduction. This meant that if Parliament had intended to exclude the application of s 33(1), it would have used express words to that effect. Examples were provided. So for instance, s 60H(6) states 'Sections 33 and 34 shall not apply to a closed-end fund' and s 65E(12) provides that 'Sections 33 and 34 shall not apply to gains or profits from disposal of a capital asset'. Reference was also made to ss 34(8), 34A(5), 34B(3), 34C(2) and 38(5).

[50] We find this submission to be without merit. This is because there is already in s 60AA(9)(b) what is to be deducted. Hence it cannot be argued that there can be a claim for commission expenses to be deducted under s 33(1) as s 60AA(9) does not prohibit it or that s 33(1) does not expressly preclude it. In those examples provided where there were express words of exclusion used, the same sections have allowed for special deductions to be made. Hence in the example of s 60H(6), there is provision for 'permitted expenses'.

Finding

[51] We would thus find that the commission expenses incurred by the taxpayer in the shareholders fund for YAs 2008 to 2013 to earn the wakalah fee from the general takaful fund are not deductible as the expenses of the shareholders fund under s 33(1) of the ITA.

APPEAL 746 BY THE REVENUE

[52] The issues for determination in this appeal are as follows:

(a) whether the Revenue has successfully discharged its burden of proof under s 91(3) of the ITA in relation to the notices of additional assessment for YAs 2008 to 2010; and

(b) whether there is any factual or legal basis for the Revenue to impose a penalty against the taxpayer under s 113(2) of the ITA for YAs 2008 to 2010.

Imposition of penalty under s 91(3) of the ITA

[53] The notices of additional assessment were issued beyond five years from YAs 2008 to 2010. Section 91(1) of the ITA allows such additional assessment to be made within five years. However, where there has been fraud, wilful default or negligence on the part of the taxpayer, such assessment made be made at any time. Section 91(3) of the ITA provides as follows:

> 91(3) The Director General where it appears to him that —
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
>
> (b) *any person has been negligent, in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the* fraud, wilful default or *negligence* in question. (Emphasis added.)

[54] It may be recalled that the HCJ noted that the taxpayer's returns were filed within the statutorily prescribed time and the documents requested by the Revenue were duly provided despite the tax audit being conducted six years upon the expiration of YAs 2008 to 2010. The HCJ found the only fault, if at all, of the taxpayer to be the different interpretation of the law which was an erroneous impression but a reasonable one and did not amount to negligence.

[55] The taxpayer is said to be negligent in preparing its tax computation and reporting its income in its tax returns for YAs 2008 to 2010. The HC had found that the only fault of the taxpayer was in having a different interpretation of the law.

[56] Negligence has not been defined in ITA. *Whiteman on Income Tax* (3rd Ed) has often been relied on for the meaning of neglect as follows:

> 'neglect' means negligence or a failure to give any notice, make any return, statement or declaration or to produce or furnish any list, document or other information required by the Income Tax Act, but a person is not deemed to have failed to do anything required in a limited time if he does it within such extended time as the Commissioner or officer concerned may allow, where a person has a reasonable excuse for not doing anything required he is deemed not to have failed do it if he does it without any reasonable delay. It should be noted that even though an incorrect return was not made fraudulently or negligently originally, a subsequent failure to remedy it without reasonable delay may result in the return being treated as having been made negligently ab initio.

[57] The taxpayer relied on a recent decision of this court in *Keysight Technologies Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2024] MLJU 1271. On the other hand, the Revenue relied on *Opus International (M) Berhad v Ketua Pengarah Hasil Dalam Negeri* [2019] MLJU 598.

[58] In *Keysight Technologies* it was held in the following paragraphs:

> [176] Contrary to the allegation, *the appellant had in fact duly reported the gain of RM821,615,000 on the sale of the IP Rights in its tax returns and computations for YA 2008 as filed with the respondent*.
>
> [177] *The appellant's employed a tax agent namely, PricewaterhouseCoopers*, who had noted in the appellant's tax computation regarding the RM821,615,000 gain as follows:
>
> > The above relates to gain on disposal of intellectual property byATMP to A TIS. This gain is capital in nature.
>
> [178] The respondent's allegation of negligence was based entirely upon their disagreement with the appellant's tax treatment of the said sum as a capital gain in its tax returns.
>
> [179] *The appellant was obviously advised by its solicitors and PricewaterhouseCoopers* that the RM821,615,000 gain was a non taxable capital gain.
>
> [180] *The appellant thus had not willy nilly classified the sum received as capital without the benefit of the relevant advice from specialists in the field*.
>
> [181] *We do not see how therefore the appellant can be said to be negligent for making a return on a tax position by relying upon professional advice*. (Emphasis added.)

[59] On the other hand, *Opus* essentially stated that reliance on professional advice was not sufficient to absolve the taxpayer of negligence nor technical adjustment. We refer to the following paras 33 and 34 where the HCJ had considered the very same type of reasons raised:

> [33] *The appellant had submitted that there was no negligence on their part as they had acted in good faith, had made full and frank disclosure, cooperated with the DGIR at all material times and had engaged the services of an independent and professional tax agents in preparing and submitting their income fax returns*.
>
> [34] However, the SCIT has made a finding of fact that the balance sum of RM19,473,324.13, which the appellant only received vide the Invoice No ST 2019 dated 24 December 1999 and Invoice No ST 2069 dated 6 April 2000 was not for post construction works, but the amount was ascertained for works already done, which can only be ascertained upon the finalization of Linkedua and the appellant's account. Therefore, the failure of the appellant to make amendments to the actual recognition of income for YA 1999 amounts to negligence. (Emphasis added.)

[60] There are grounds for the *Opus* decision in the HC. Although the decision of the HC was affirmed by this court on 7 September 2020, there are no grounds of judgment by this court. Thus, we cannot be certain as to the reasoning behind the decision.

[61] There are however grounds of decision given by this court in *Keysight Technologies*. We agree with the cogent reasons given. It was said that the taxpayer could not be negligent by relying upon professional advice and had

not willy nilly classified the sum received without the benefit of relevant advice from specialists. Coincidentally, the tax specialist advising the appellant in *Keysight Technologies* and the taxpayer here is the same, PricewaterhouseCoopers and PWC.

[62] There are also other authorities which align with the above proposition. In *Piramid Intan Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2015] 10 MLJ 436, which was also referred to by the HCJ, it was said at pp 455 and 456:

> [38] The differing interpretation of whether the payments made are capital or revenue expenditure is very much an issue in this case. And here the appellant had interpreted that they were entitled to treat the payments they made to STIDC as revenue expenditure which if their interpretation was correct would be allowable as deduction and I may also add that the appellant in this case had relied on professional tax consultant ...
>
> [39] ... Surely these views constitute differing interpretation because it was the appellant's interpretation that the payments they had made could be considered as deductions believing that the payments were revenue expenditure. Certainly such differing interpretation cannot be view as escaping from paying tax. This surely cannot be equated with the facts of Syarikat Ibraco-Peremba Sdn Bhd, where ... 'the facts as found by SCIT showed that there was tax avoidance when the transactions entered into by the appellant through the shell companies revealed the factual situation that the tax position was altered; that STIC found the appellant had in fact implemented a scheme following the advice of the Tax Consultant in perpetuating one original intention of selling of the properties as intended to do from the start' (para 27 line 4 p 24 of the judgment). There was none of this in the present case.

Differing interpretations and reliance on professional tax consultant were held to be not negligent.

[63] *Ketua Pengarah Hasil Dalam Negeri v CIMB Group Holdings Bhd* [2024] MLJU 1114 has also taken that approach. At paras 10 and 11 this was stated:

> [10] So, in light of the prevailing circumstances, *the question to be determined here is; in taking the ordinary meaning of negligence, whether the respondent has been careless or reckless in his responsibility to submit his tax returns* for the YAs 2009, 2010, and 2011. Here, *the DGIR and the respondent, who is advised by independent tax advisors and who are competent in the field of tax law, have taken different views with regard to a tax provision* ie the provisions referred to by the DGIR. *This is not unusual It happens every day. In such circumstances, unless something more is shown, the taxpayer ie the respondent cannot be said to have been negligent in having a different view* (see *Gedir v Revenue and Customs Commissioners* [2016] UKFTT 188 (TC) and *Anderson v Revenue and Customs Commissioners* [2016] UKFTT 335 (TC)).
>
> [11] The facts of the instant case do not come within the Whiteman instances of being negligent. The instant case is also not a case where the respondent has acted against the ordinary dictionary meaning of being negligent. *Having a different view from the DGIR does not tantamount to being negligent-something more is required*. I

hold that the taxpayer in the instant case did not omit to do something that a reasonable person would do or did something that a reasonable person would not do, neither did it do anything that is careless or reckless. (Emphasis added.)

[64] We were also referred to *Gedir v Revenue and Customs Comrs* [2016] UKFTT 188 (TC) where the following was said:

117.

What of the related, but different, point which arises in this case *where a particular piece of legislation is open to different interpretations and there is no authority on the point and/or where the application of the legislation is uncertain?*

...

119.

It is, unfortunate, far from unusual for a particular piece of tax legislation to contain a 'grey area'. *It is commonplace for there to be more than one tenable interpretation of a provision or its application and for an advisor to 'take a view' as to which interpretation should be adopted. That will generally be the interpretation which is most favourable to the taxpayer. It may be acknowledged that interpretation is not beyond challenge, but provided the view is a reasonable one, the advisor is entitled to take it and to advise the taxpayer on that basis and the taxpayer is entitled to rely on that advice*.

...

121.

We do not consider that a taxpayer is obliged to take advice from another advisor in this situation. *Where there is scope for different views about a provision, there is no guarantee that another advisor's opinion will be the 'correct' interpretation*. We are, by definition, considering a situation where there is uncertainly which may ultimately need to be resolved by the tribunals or the courts; different people may well take different views, all of which are tenable. (Emphasis added.)

[65] There thus seems to be a recognition that differing views and taking a more favourable view to a taxpayer is acceptable and reasonable care is regarded as being taken when there is consultation with a competent advisor. Here the differing view is whether s 33(1) of the ITA applies rather than s 60AA(9)(b) where the taxpayer had been advised by a renowned tax specialist.

[66] Under the circumstances, we find that the taxpayer was not negligent and the Revenue has not successfully discharged its burden of proof under s 91(3) in relation to the notices of additional assessment for YAs 2008 to 2010.

Imposition of penalty under s 113(2) of the ITA

[67] Section 113(2) of the ITA provides as follows:

(2) Where a person —

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct;

[68] Given our above finding on s 91(3), we are of the considered opinion that the penalty under s 113(2) was incorrectly imposed.

CONCLUSION

[69] For all the above reasons, we find no merit in both appeals and the appeals are dismissed. We make no order as to costs.

[70] My learned sister, Justice Azizah bt Haji Nawawi JCA, has read this judgment in draft and expressed her agreement with it whereas my learned brother, Justice Lim Chong Fong JCA, has dissented on Appeal 726, and has written a separate judgment.

Lim Chong Fong JCA (delivering dissenting judgment of the court):

INTRODUCTION

[71] These are two related income tax appeals pertaining to deduction of commission expenses under s 33 of the Income Tax Act 1967 ('the ITA'). Appeal 726 is the appeal by Etiqa Family Takaful Bhd ('taxpayer') against the decision of the High Court dismissing the taxpayer's appeal whereas Appeal 746 is the appeal by the Director General of Inland Revenue ('Revenue') against the decision of the High Court allowing the taxpayer's appeal.

[72] We heard the both Appeal 726 and Appeal 746 together on 18 July 2024.

[73] Subsequently, it is evident that my learned sisters Justice Azizah Nawawi JCA and Justice See Mee Chun JCA are minded to dismiss both Appeal 726 and Appeal 746.

[74] I am in concurrence with them on Appeal 746. However, with respect, I am unable to concur with them on Appeal 726 and am hence constrained to

deliver this dissenting judgment to set forth my reasons thereto.

BACKGROUND

[75] The background facts and the decision of the High Court are adequately set out in the majority judgment of Appeal 726 and I adopt them for purposes herein.

MY FINDINGS

[76] The pivotal issue in Appeal 726 is whether the commission expenses incurred by the taxpayer to earn the wakalah fee from the general takaful fund for year of assessment 2008 to 2013 are deductable as expenses under s 33(1) of the ITA.

[77] For this purpose, the relevant undisputed facts are that the taxpayer is principally carrying out the business of managing the general takaful, family takaful and investment takaful businesses ('takaful business'). The wakalah fee earned from the general takaful fund is the taxpayer's gross income for the takaful business schemes. The takaful business schemes can never be marketed without incurring commission expenses paid to generate the wakalah fee income.

[78] The taxpayer therefore contended that s 33(1) of the ITA is applicable for deduction of the commission expenses incurred. This deduction is neither precluded by s 33(1) of the ITA itself nor s 60AA(9)(b) of the ITA.

[79] However, the Revenue counter-contended that s 60AA(9)(b) of the ITA is a specific provision that caters specifically for takaful businesses; hence it overrides the general provision in s 33(1) of the ITA based on the principle *generalia specialibus non derogant*. This is also evident by the amendment made to s 60AA(9) of the ITA via the Finance Act 2013 to allow for the deduction of commission expenses as an allowable expense with effect from the year of assessment 2014 onwards.

[80] The learned High Court judge held as follows with emphasis added by me:

> The learned SRC submitted that the ITA treats the takaful business as a separate and distinct business. It is for this reason, according to the learned SRC, that Parliament inserted s 60AA of the ITA to deal with the specific business of a takaful operator. Thus, the issue of the allowable expenses of a Takaful operator must be construed in light of the purpose and intention behind the specific provisions contained in s 60AA of the ITA that governs the takaful business.
>
> *I find merits in this line of argument. If indeed s 33(1), the so-called basket provision is*

sufficient to cover the commission expenses by the appellant, why is the necessity for Parliament to enact s 60AA of the ITA in the first place.? It is trite that Parliament is assumed to know the law that it enacts. Parliament does not act in vain by legislating for the sake of legislating.

[81] It is therefore apt to reproduce ss 33 and 60AA of the ITA here:

Chapter 4 — Adjusted income and adjusted loss

33 Adjusted income generally

(1) Subject to this act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including:

(a) subject to subsection (2), any sum payable for that period (or for any part of that period) by way of interest upon any money borrowed by that person and:

(i) employed in that period in the production of gross income from that source; or

(ii) laid out on assets used or held in that period for the production of gross income from that source;

(b) rent payable for that period (or for any part of that period) by that person in respect of any land or building or part thereof occupied by him in that period for the purpose of producing gross income from that source;

(c) expenses incurred during that period for the repair of premises, plant, machinery or fixtures employed in the production of gross income from that source or for the renewal, repair or alteration of any implement, utensil or article so employed, other than implements, utensils, articles (the expenditure on which would be qualifying plant expenditure for the purposes of Schedule 3) or any means of conveyance, excluding the cost of reconstructing or rebuilding:

(i) any premises, buildings, structures or works of a permanent nature;

(ii) any plant or machinery; or

(iii) and

(d) such other deductions as may be prescribed.

(2) Where a person, being a person to whom paragraph (1) (a) applies in relation to gross income from a business of his for the basis period for a year of assessment and in relation to borrowed money, has made (otherwise than for the purpose of producing that gross income) any loan of money or any investment in movable or immovable property, and the loan or any part thereof is outstanding at any time in that period or the investment or any part thereof is held by him at any time in that period and it appears to the Director General that the loan or any part thereof or the

investment or any part thereof has been financed wholly or partly or directly or indirectly out of the borrowed money:

(a) the total sum payable for that period or any part thereof by way of interest on that borrowed money shall be deemed to accrue evenly over that period or part thereof, and so much of that sum as is thus found to accrue during each calendar month shall be taken to be the monthly figure for the purposes of this subsection;

(b) if at the end of any calendar month the aggregate of:

(i) the amount of the loan then outstanding if any; and

(ii) the cost of so much of the investment as is held by him at that time if any,is less than the amount of that borrowed money, the monthly figure for that month shall be reduced by an amount which bears to that monthly figure the same proportion as that aggregate bears to the amount of that borrowed money or by an amount which in the opinion of the Director General is just and reasonable in all the circumstances;

(c) if at the end of any calendar month the aggregate mentioned in the preceding paragraph is more than the amount of that borrowed money, the monthly figure for that month shall be reduced to nil or to an amount which in the opinion of the Director General is just and reasonable in all the circumstances; and

(d) the amount of the deduction to be made for the period in respect of that borrowed money shall be an amount consisting of the aggregate of:

(i) the monthly figures for all calendar months to which paragraph (b) or (c) applies, as reduced by either of those paragraphs; and

(ii) the monthly figures for the other calendar months.

(3) In subsection (2) 'calendar month', in relation to a basis period or part thereof, means a period which is included in that basis period or part thereof and is either:

(a) one of the twelve months of the Gregorian calendar; or

(b) where that basis period or part thereof includes a part, but not the whole, of such a month, that part of that month.

(4) For the purposes of paragraph (1) (a) and subsection (2), where any sum payable for a basis period for a year of assessment is not due to be paid in that period, the sum shall when it is due to be paid be deducted in arriving at the adjusted income of a person for that period.

Chapter 8 — Special Cases

...

60AA Takaful business

(1) This section shall apply for ascertaining the adjusted income for the basis period

for a year of assessment from the takaful business of an operator.

(2) For the purposes of this section:

(a) subject to paragraph (b), where an operator carries on family solidarity business (in this section referred to as 'family business') in conjunction with general business, the family business and the general business shall be treated as separate takaful businesses;

(b) where an operator carries on:

(i) an inward re-takaful business, the inward re-takaful business and general business (excluding the inward re-takaful business and offshore takaful business) shall be treated as separate general businesses; and

(ii) an offshore takaful business, the offshore takaful business and the general business (excluding the offshore takaful business and inward re-takaful business) shall be treated as separate general businesses;

(c) where an operator carries on family business, the income of the fund established in respect of that business (in this section referred to as 'family fund') shall be treated as a separate source of income from the income of the shareholders' fund in respect of the family business:

(d) Provided that:

(i) where the operator also carries on family solidarity re-takaful business, the family solidarity re-takaful business shall be a separate source from family business and shall be treated as a general business; or

(ii) where the operator also carries on inward family solidarity re-takaful business, the inward family solidarity re-takaful business shall be a separate source from family business and shall be treated as a general business;

(e) where an operator carries on only family solidarity re-takaful business, that business shall be treated as a general business; and

(f) where an operator carries on inward re-takaful business, offshore takaful business, family solidarity re-takaful business or general business (excluding those businesses), the income of the fund established in respect of each of the businesses (in this section referred to as 'inward re-takaful fund', 'offshore fund', 'family re-takaful fund' and 'general fund' respectively) shall be treated as a separate source of income from the income of the shareholders' fund in respect of those businesses.

(3) The adjusted income of the family fund, other than income arising from family solidarity re-takaful business, for the basis period for a year of assessment of an operator resident for the basis year for that year of assessment shall be ascertained by:

(a) taking the aggregate of:

A (i) the amount of gross income for that period from the investments made out of any of the operator's family funds; and

(ii) the amount of any gross proceeds (whether or not of an income nature) which are not gross income to which subparagraph

B (iii) applies and which are first receivable in that period in connection with the realization of the investments or any right arising from them; and

(b) deducting from that aggregate:

C (i) where subparagraph (a) (ii) is applicable for that period to gross proceeds receivable in connection with any investment or right, the cost of acquiring and realizing the investments or rights; and

(ii) the proportion of profits from investments distributed or credited to the participant or to the shareholders' fund for that period out of

D any of the operator's family funds.

(4) The adjusted income of the family fund, other than income arising from family solidarity re-takaful business, for the basis period for a year of assessment of an operator not resident for the basis year for that year of assessment shall, where that business is wholly or partly carried on in Malaysia, be ascertained by:

E (a) taking the aggregate of:

(i) the amount of gross income for that period from the investments made (in Malaysia or elsewhere) out of the operator's Malaysian family funds; and

F (ii) the amount of any gross proceeds (whether or not of an income nature) which are not gross income to which subparagraph

(iii) applies and which are first receivable in that period in connection with the realization of the investments or any right arising from them; and

G (b) deducting from that aggregate:

(i) where subparagraph (a) (ii) is applicable for that period to gross proceeds receivable in connection with any investment or right, the cost of acquiring and realizing the investments or rights; and

H (ii) the proportion of profits from investments distributed or credited to the participant or to the shareholders' fund for that period out of any of the operator's Malaysian family funds.

(5) The adjusted income of the general fund in respect of general business for the basis period for a year of assessment of an operator resident for the basis year for that

I year of assessment shall be ascertained by:

(a) taking the aggregate of:

(i) the amount of the gross contributions first receivable in that period in respect of general certificate, issued by him (less the amount of

any contribution or contract received at any time in respect of such certificate or contract and returned by him during the period and the amount of wakalah fee which is attributable to the shareholders' fund);

(ii) the amount of any other gross income for that period from that business (including any commission and any profit from investment held in connection with that business);

(iii) the amount of any gross proceeds (whether or not of an income nature) which are not gross income to which subparagraph

(iv) applies and which are first receivable in that period in connection with the realization of the investments or any right arising from them;

(v) any amount recovered or recoverable by him in that period under re-takaful contracts made in connection with that business; and

(vi) the amount of his reserve fund for unexpired risks at the end of the immediately preceding basis period; and

(b) subject to subsection (12), by deducting from that aggregate the amount of:

(i) claims incurred in that period in connection with his general certificate;

(ii) re-takaful contributions payable by him in that period in connection with that business;

(iii) commissions payable and discounts allowed by him in that period in connection with that business carried out in accordance with the principle of mudharabah;

(iv) his reserve fund for unexpired risks at the end of that period;

(v) where subparagraph (a)(iii) is applicable for that period to gross proceeds receivable in connection with any investment or right, the cost of acquiring and realizing the investments or rights;

(vi) any fee other than wakalah fee attributable to the shareholders' fund;

(vii) any share of profits distributed or credited to the participant or shareholders' fund for that period out of any of the operator's general fund; and

(viii) management expenses incurred by him in that period in connection with his general business carried out in accordance with the principle of mudharabah;

(6) The adjusted income the inward re-takaful fund, offshore fund or family re-takaful fund for the basis period for a year of assessment in respect of inward re-takaful business, offshore takaful business or family solidarity re-takaful business respectively of an operator resident for the basis year for that year of assessment shall

consist of an amount arrived at by applying subsection (5) and references in that subsection to:

(a) 'general certificate' shall be construed as references to 'inward re- takaful contract', 'offshore takaful certificate' or 'family solidarity re-takaful certificate', as the case may be;

(b) 'general business' shall be construed as references to 'inward re- takaful business', 'offshore takaful business' or 'family solidarity re- takaful business', as the case may be; and

(c) 'reserve fund for unexpired risks' and 'operator' shall in the case of family solidarity re-takaful business be construed as references to 'actuarial valuation reserve' and 'family solidarity operator' respectively:
Provided that in the case of inward re-takaful business or offshore takaful business, no deduction shall be allowed on any share of profits distributed or credited to the participant or shareholders' fund for that period out of any of the operator's inward fund or offshore fund, as the case may be.

(7) The adjusted income of the general fund in respect of general business for the basis period for a year of assessment of an operator not resident for the basis year for that year of assessment shall, where that business is wholly or partly carried on in Malaysia be ascertained by:

(a) taking the aggregate of:

(i) the amount of the gross contribution first receivable in that period in respect of Malaysian general certificate or contract, issued by him (less the amount of any contribution received at any time in respect of such certificate or contract and returned by him during the period and the amount of wakalah fee which is attributable to the shareholders' fund);

(ii) the amount of any other gross income for that period derived from Malaysia from that business (including any commission and any profit from investment, wherever made, held in connection with that business);

(iii) the amount of any gross proceeds (whether or not of an income nature) which are not gross income to which subparagraph (ii) applies and which are first receivable in that period in connection with the realization of the investments or any right arising from them;

(iv) any amount recovered or recoverable by him in that period under re-takaful contracts made in connection with Malaysian general certificate of that business; and

(v) the amount of his reserve fund for unexpired risks relating to any such Malaysian general certificate at the end of the immediately preceding basis period; and

(b) subject to subsection (12), by deducting from that aggregate the amount of:

(i) claims incurred in that period in connection with his Malaysian general certificate;

(ii) re-takaful contributions payable by him in that period in connection with any such Malaysian general certificate;

(iii) commissions payable and discounts allowed by him in that period in connection with any such Malaysian general certificate of that business carried out in accordance with the principle of mudharabah;

(iv) his reserve fund for unexpired risks relating to any such Malaysian general certificate at the end of that period;

(v) where subparagraph (a) (iii) is applicable for that period to gross proceeds receivable in connection with any investment or right, the cost of acquiring and realizing the investment or right;

(vi) any fee other than wakalah fee attributable to the shareholders' fund;

(vii) any share of profits distributed or credited to the participant or to the shareholders' fund for that period out of any of the operator's Malaysian general fund; and

(viii) management expenses incurred by him in that period in connection with his general business carried out in accordance with the principle of mudharabah;

(8) The adjusted income of the inward re-takaful fund, offshore fund or family re-takaful fund for the basis period for a year of assessment in respect of inward re-takaful business, offshore takaful business or family solidarity re- takaful business respectively of an operator not resident for the basis year for that year of assessment shall, where that business is wholly or partly carried on in Malaysia, consist of an amount arrived at by applying subsection (7) and references in that subsection to:

(a) 'Malaysian general certificate' shall be construed as references to 'inward re-takaful contract', 'offshore takaful certificate' or 'Malaysian family solidarity re-takaful certificate', as the case may be;

(b) 'general business' shall be construed as references to 'inward re- takaful business', 'offshore takaful business' or 'family solidarity re- takaful business', as the case may be; and

(c) 'reserve fund for unexpired risks' and 'operator' shall in the case of family solidarity re-takaful business be construed as references to 'actuarial valuation reserve' and 'family solidarity operator' respectively:

Provided that in the case of inward re-takaful business or offshore takaful business, no deduction shall be allowed on any share of profits distributed or credited to the participant or shareholders' fund for that period out of any of the operator's inward fund or offshore fund, as the case may be.

(9) The adjusted income of the shareholders' fund, for the basis period for a year of

assessment of an operator resident for the basis year for that year of assessment shall be ascertained by:

(a) taking the aggregate of:

(i) the amount of gross income of that period from the investments made by the operator out of any of the shareholders' funds;

(ii) the amount of any gross proceeds (whether or not of an income nature) which are not gross income to which subparagraph (i) applies and which are first receivable in that period in connection with the realization of the investments or any right arising from them;

(iii) the amount of gross income for that period in respect of wakalah fee or any other fee receivable in connection with the family fund, general fund, re-takaful fund or family re-takaful fund;

(iv) any amount of qard recovered by him in that period in connection with the family fund;

(v) the amount of gross income for that period in respect of profits from investments distributed or credited from family fund, or in respect of profits distributed or credited from general fund or family re-takaful fund; and

(vi) the amount of actuarial surplus from the family fund that is transferred to the shareholders' fund; and;

(b) deducting from that aggregate:

(i) where subparagraph (a) (ii) is applicable for that period to gross proceeds receivable in connection with any investment or right, the cost of acquiring and realizing the investments or rights;

(ii) so much of the amount of qard incurred in that period in connection with the family fund;

(iii) the amount of management expenses incurred by him in that period in connection with his general business carried out in accordance with the principle of wakalah; and

(A) wakalah fee receivable in relation to the family fund, general fund, inward retakaful fund, offshore fund or family retakaful fund; or

(B) any other fee receivable in relation to the family fund, general fund, inward retakaful fund, offshore fund or family retakaful fund; and

(c) commission payable and discounts allowed by him in that period in connection with his family business and general takaful business carried out in accordance with the principle of wakalah.

(10) The adjusted income of the shareholders' fund, for the basis period for a year of assessment of an operator not resident for the basis year for that year of assessment

shall, where that business is wholly or partly carried on in Malaysia be ascertained by:

(a) taking the aggregate of:

(i) the amount of gross income for that period from the investments made by the operator out of any of the shareholders' funds;

(ii) the amount of any gross proceeds (whether or not of an income nature) which are not gross income to which subparagraph (i) applies and which are first receivable in that period in connection with the realization of the investments or any right arising from them;

(iii) the amount of gross income for that period in respect of wakalah fee or any other fee receivable in connection with the family fund, general fund, re-takaful fund or family re-takaful fund;

(iv) any amount of qard recovered by him in that period in connection with the family fund;

(v) the amount of gross income for that period in respect of profits from investments distributed or credited from family fund, or in respect of profits distributed or credited from general fund or family re-takaful fund; and

(vi) the amount of actuarial surplus from the family fund that is transferred to the shareholders' fund; and

(b) deducting from that aggregate:

(i) where subparagraph (a) (ii) is applicable for that period to gross proceeds receivable in connection with any investment or right, the cost of acquiring and realizing the investments or rights;

(ii) so much of the amount of qard incurred in that period in connection with the family fund;

(iii) the amount of management expenses incurred by him in that period in connection with his general business carried out in accordance with the principle of wakalah; and

(A) wakalah fee receivable in relation to the family fund, general fund, inward retakaful fund, offshore fund or family retakaful

(B) any other fee receivable in relation to the family fund, general fund, inward retakaful fund, offshore fund or family retakaful fund; and

(iv) commission payable and discounts allowed by him in that period in connection with his family business and general takaful business carried out in accordance with the principle of wakalah.

(10A) For the purposes of ascertaining the adjusted income of the family fund, general fund or shareholders' fund referred to in subsection (3), (4), (5), (7), (9) or

(10), as the case may be, the cost of acquiring and realizing any investments or rights for the basis period for a year of assessment shall include expenses incurred in managing those investments or rights, and such expenses incurred shall be determined in accordance with the following

(A/B) x C

where A is the cost of acquiring any investments or rights which is realized in that period in respect of such fund;

B is the total cost of acquiring all investments or rights held during that period in respect of such fund; and

C is the total expenses incurred in that period for managing all investments or rights held during that period in respect of such fund.

(11) The adjusted income as ascertained under subsections (9) and (10) shall be deemed to be the statutory income from that source.

(12) Where an operator carrying on general business has re-takaful the risks or part of the risks with a re-takaful operator who either does not carry on the business of takaful of that kind in Malaysia or does not re-takaful the risks through a branch in Malaysia, there may be deducted under subparagraph (5) (b) (ii) or (7) (b) (ii) in respect of such risks which are re-takaful only ninety- five per cent of the amount which would otherwise be deductible:

Provided that in the case where subsection (7) or (8) apply (other than in the case of family solidarity re-takaful business), the operator may elect that no deductions shall be made under subparagraph (7) (b) (ii) and if he does so:

(a) the election shall be irrevocable and shall apply in relation to the basis period for the year of assessment for which it is made and for the basis periods for all subsequent years of assessment; and

(b) amounts recoverable under re-takaful contracts shall be disregarded for the purposes of subparagraph (7) (a) (iv).

(13) Where an operator in connection with his family business or his general business receives any incidental gross income (not being a contribution on a certificate issued in the course of carrying on that family or general business) for which subsections (3) to (10) and subsection (12) do not provide, that income shall be treated as income of the operator falling under paragraph 4 (f) and he shall be deemed to have a separate source in respect of it.

(14) Where under this section all such deductions as would be made in computing what would have been the adjusted income for the basis period for a year of assessment from takaful business of an operator if any such adjustment income had been ascertainable exceed the aggregate of the amounts from which those deductions would otherwise have been made, the amount of the excess shall be taken to be the amount of his adjusted loss from that business for that period.

(15) Notwithstanding subsection (14) and subsection 43(2), any unabsorbed losses of the family fund shall only be available for deduction against the statutory income for the basis period for a year of assessment and subsequent years of assessment in

respect of the family fund of the operator.

(15A) In arriving at the total income of an operator for a year of assessment:

(a) the adjusted loss from a source or sources of an operator for that year of assessment other than from a source consisting of a family fund, shall be available as deduction against the aggregate statutory income (excluding the statutory income from a source consisting of a family fund) of an operator; and

(b) any unabsorbed loss ascertained under subsection 44(4) or (5) for that year of assessment shall not be deducted against the statutory income of the family fund of the operator for the subsequent years of assessment.

(16) Notwithstanding paragraph 75 of Schedule 3, any unabsorbed allowances of the family fund shall only be available for deduction against the adjusted income for the basis period for a year of assessment and subsequent years of assessment in respect of the family fund of the operator.

(17A) Allowances under Schedule 3 shall only be available for deduction against the adjusted income of the shareholders' fund of the takaful operator and the balance of such allowances shall not be available for deduction against the adjusted income of the family fund or general fund of the takaful operator.

(17B) The allowances under subsection (17A) shall be in relation to any asset acquired under the shareholders' fund of the takaful operator on or after 1 January 2022.

(17C) Notwithstanding paragraph 75 of Schedule 3, any unabsorbed allowances of the shareholders' fund of the takaful operator shall only be available for deduction against the adjusted income for the basis period for a year of assessment and subsequent years of assessment in respect of the shareholders' fund of the takaful operator.

(17D) Where in respect of any asset acquired prior to 1 January 2022, allowances under Schedule 3 which have been claimed or ought to have been claimed as deduction against the adjusted income of the family fund or general fund of the takaful operator, such allowances shall be claimed as deduction against the adjusted income of the family fund or general fund of the takaful operator until the whole amount of the allowances is claimed.

(18) Any income which is distributed or credited to a participant under this section shall be deemed to be derived from Malaysia.

(19) The chargeable income in respect of the family fund as determined under subsections (3) and (4) is subject to tax as specified under Part XII of Schedule 1.

(20) Where an operator carries on inward re-takaful business or offshore takaful business in conjunction with other takaful businesses, the part of the chargeable income for a year of assessment which is attributable to that inward re-takaful business or offshore takaful business shall consist of an amount which bears the same proportion to the chargeable income for that year of assessment of the operator as the part of the aggregate income which relates to the inward re-takaful business or offshore takaful business bears to the whole of the aggregate income for

A that year of assessment from all sources of the operator.

(21) The amount arrived at under subsection (20) shall be treated as his chargeable income for a year of assessment of a takaful operator from re- takaful business for the purposes of paragraph 4 of Part I of Schedule 1.

B (22) As soon as any amount of chargeable income from the re-takaful business of a takaful operator, being a company resident for the basis year for a year of assessment, has been subject to income tax at the rate of eight per cent:

(a) the net amount of that income (after deduction of such tax) shall be credited to an account (that account and company being referred to as the C exempt account and the relevant company respectively); and

(b) paragraph 5 (except subparagraph (1) thereof) and paragraph 6 of Schedule 7a shall apply as if any reference in those paragraphs to any income exempted or which has become exempt under paragraph 3 were a reference to income credited to the exempt account.

D

(23) In this section:

'family takaful business' has the same meaning assigned to it under subsection 2(1) of the Islamic Financial Services Act 2013;

E 'general takaful business' means all takaful business which is not family takaful business;

'general takaful certificate' means a certificate other than a family takaful certificate;

'investment' includes any accretions thereto;

F 'Malaysian family takaful fund' means the takaful fund in respect of Malaysian family takaful certificate;

'Malaysian takaful certificate' has the same meaning assigned to it under subsection 2(1) of the Islamic Financial Services Act 2013;

G 'qard' means a benevolent loan or other forms of financial support to the takaful fund from the shareholders' fund made pursuant to section 95 of the Islamic Financial Services Act 2013;

'retakaful' has the same meaning assigned to it under subsection 2(1) of the Islamic Financial Services Act 2013;

H 'takaful' has the same meaning assigned to it under section 2 of the Takaful Act 1984;

'takaful business' has the same meaning assigned to it under section 2 of the Takaful Act 1984;

I 'takaful certificate' has the same meaning assigned to it under subsection 2(1) of the Islamic Financial Services Act 2013;

'wakalah fee' means a fee in respect of a contract which gives the power to a person to nominate another person to act on his behalf based on agreed terms and conditions.

(24) For the purpose of this section, an operator's reserve fund for unexpired risks at the end of a basis period shall consist of:

(a) twenty-five per cent of the difference between the gross contributions first receivable by him in that period in respect of marine, aviation or transit certificates issued by him and the amount deducted under subparagraph (5) (b) (ii) or (7) (b) (ii); and

(b) an amount calculated based on the method of computation as determined by the relevant authority regulating the takaful industry and which is consistently applied to contributions first receivable by him in that period in respect of other general certificates issued by him less the amount deducted under subparagraph (5) (b) (ii) or (7) (b) (ii).

[82] It is plain that this appeal centers on the proper interpretation of the ITA.

[83] In this regard, it is useful to be reminded of the following dicta of Vernon Ong Lam Liat FCJ on statutory interpretation in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2024] 4 MLRA 394 (FC) as follows with emphasis added:

[30] In our opinion, the rules governing statutory interpretation may be summarized as follows. *First, in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it*. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. *Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used*. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited'. *Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment*. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that

bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself.

[31] In the particular circumstances of this case, we are of the considered view that the provisions in an enactment should be interpreted purposively and harmoniously and within the contextual background in which the provisions of statute present itself. Further we do not think that statutory provisions should be interpreted in vacuo statutory provisions are interpreted to be applied to the established facts of a case.

[84] In interpreting the ITA, particularly the interplay of s 33(1) of the ITA vis a vis s 60AA of the ITA, I am firstly guided by the Privy Council case of *The Great Eastern Life Assurance Co Ltd v Director General of Inland Revenue* [1987] 2 MLJ 529 that concerned s 60 of Chapter 8 of the ITA. Lord Oliver of Aylmerton therein held as follows with emphasis added:

... The appellant argues, however, that the prima facie applicability of ss 3 and 4 is ousted by the specific provisions of s 60 which, so it is said, provide a complete and separate code for the taxation of investment income of life insurance companies. In computing the income of a non-resident insurance company carrying on business in Malaysia, it is said, s 60(4)(a) makes it clear that the only income from investments in Malaysia to be brought into account is the income of those investments which are made out of the insurer's Malaysian Life Fund. That is, of course, quite inconsistent with ss 3 and 4 of the Act *but, it is argued, that inconsistency is catered for by the provisions of s 52 already quoted, which have the effect of substituting the provisions of Chapter 8 as the exclusive taxing code for (inter alia) persons carrying on life insurance business in Malaysia*. That argument, if correct, has, as was pointed out in the course of the hearing before their Lordships, results which border on the absurd and can hardly have been intended by the Legislature ... If, of course, that is the effect of the statutory provisions, so be it; but a construction which yields so curious a result is one which requires to be examined with some care ... The Special Commissioners dealt with the argument very simply. *Section 60, in their view, was not concerned with chargeability to tax but merely with the computation of the adjusted income upon which tax is to be charged*. It is not therefore to be treated as an exclusive code governing the conditions upon which tax is to be charged. So far as the law of Malaysia is concerned, the fact that certain investments may have been earmarked for the Singapore Life Fund is irrelevant. Those investments are simply, as are the non-assigned funds, investments producing income which accrues in or is derived from Malaysia and that income is chargeable under sections 3 and 4 of the Act. *There is no inconsistency between s 60 and ss 3 and 4, the former being merely concerned with the method of computation of the income chargeable to tax under the latter* ... The point is a short one not susceptible of a great deal of elaboration. *Their Lordships prefer the approach of the Special Commissioners. Just as in the case of an individual, Chapter 4 of the Act provides a code for the computation of the adjusted income for tax purposes, so the provisions of Chapter 8 and of s 60 in particular provide a similar code for the special cases to which they relate. They cannot, in their Lordships' judgment, be treated as ousting or supplanting the provisions of sections 3 and 4 from*

which the chargeability to tax arises except in relation to the particular types of income to which they specifically relate ...

I am nonetheless mindful that the facts therein concerned income chargeable and not permissible deductible expenses but the applicable principles in my view would not differ especially on exclusivity of s 60 of Chapter 8 of the ITA.

[85] Thus, and more importantly, this court in *Ketua Pengarah Hasil Dalam Negeri v Tune Insurance Berhad* (W-01(A)-308–06 of 2019) (unreported), which was by the consent of the parties affirmed in *Tune Insurance Malaysia Berhad v Ketua Pengarah Hasil Dalam Negeri* [2019] MLJU 933; [2019] 1 LNS 1276 where Nordin Hassan J (now FCJ) held as follows concerning permissible deductible expenses in relation to s 60(5)(b)(i) ITA in respect of insurance business with emphasis added by me:

> [16] Pursuant to this s 33(1), it is clear that taxpayer can claim for deduction for outgoings and expenses incurred during the period in the production of gross income.
>
> [17] This has been explained by the Court of Appeal in the case of *Aspac Lubricants (M) Sdn Bhd (formerly known as Castrol (M) Sdn Bhd) v Ketua Pengarah Hasil Dalam Negeri* [2007] 6 MLJ 65; [2007] 5 CLJ 353 where s 33(1) was referred as 'the basket provision' and states as follows:
>
> > [2] The appellant relies on what is commonly referred to as 'the basket provision' to support its deduction of the expenses in question. This is in fact the opening paragraph of s 33(1) of the Income Tax Act 1967 ('the Act') which reads as follows:
> >
> > > Subject to this Act, the adjusted income of a person from a source for the period for a year of assessment shall be an amount ascertained by deduction from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source ...
> > >
> > > I have lent emphasis to that part of the subsection on which the appellant relies.
>
> [18] In another case, *North Borneo Timbers Bhd v Ketua Pengarah Hasil Dalam Negeri* [1998] 4 MLJ 706; [1999] MSTC 3,741, Justice Charles Ho had this to say in regard to the provision of s 31(1):
>
> > It appears to me the Special Commissioners did not seem to fully appreciate that the taxpayer company in the present case is entitled to fall back on the general provisions of s 33(1) if it fails to bring its case within the specific provisions of s 33(1)(c). In order to qualify for deduction under s 33 of the Act, it is not necessary that a taxpayer must show that the expenses and outgoings, for which a claim for deduction is made, fall within one of the expenses and outgoings specifically mentioned in paras 33(1)(a) to 33(1)(d) of the section. The taxpayer can rely on the general provisions of that section to claim for deduction if the

taxpayer is able to show that such outgoings and expenses are actually incurred wholly and exclusively during that period in the production of gross income.

[19] The next relevant and related provision on this issue is s 60(5)(b)(i) which provides:

> (5) The adjusted income for the basis period for a year of assessment from the general business of an insurer resident for the basis year for that year of assessment shall consist of an amount arrived at by —
>
> ...
>
> ...
>
> (b) subject to section (7), deduction from that aggregate the amount of-
>
> (i) claims incurred in that period in connection with his general policies;

[20] *Here, there is nothing under this provision that precludes the application of s 33(1) and I agree with the applicant's contention that s 60(5)(b)(i) supplements and applies over and above s 33(1)*. This too is consistent with s 52 of the ITA 1967 which states:

> In a case where any provision of this Chapter applies, the foregoing Chapters shall also apply but shall be modified in their application to the extent necessary to conform with that provision; and, if in that case there is any inconsistency between that provision and any provision of the foregoing Chapters, that provision of those Chapters shall be void to the extent of the inconsistency.

[21] *In the circumstances, s 60(5)(b)(i) and s 33(1) of ITA 1967 are applicable in relation to this issue of deduction of PRAD expenses*.

[22] *The essential element in both ss 33(1) and 60(5)(b)(i) are with regard to 'expenses incurred' and the word 'incurred' in s 33(1) includes the sum which is under the obligation of the taxpayer to pay and not confined to actual disbursement*.

[23] This principle of law has been explained in numbers of decided cases and among others, in the Court of Appeal case of Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428; [2005] 4 CLJ 810 which states as follows:

> Revenue's argument is simple enough. It says that the important words in s 33(1) are 'expenses wholly and exclusively incurred'. In other words, it must be money actually spent. The benefit plan is in respect of monies that are never 'incurred'. They are there to meet a mere contingency. So they form part of the adjusted income and attract tax.
>
> Learned counsel for revenue submits that Lo & Lo is distinguishable because of the difference in the actual wording of s 16 of the Hong Kong Ordinance. It is also submitted that s 33(1), being a taxing statute, should be given a strict construction and hence the words 'expenses wholly and exclusively incurred' should receive a narrow interpretation. The oft quoted judgment of Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 was prayed in aid of this submission. With respect, I am unable to agree with these arguments.

In the first place, the word 'expenses wholly and exclusively incurred' appearing in s 33(1) include a sum which the taxpayer is under an obligation to pay. That is the proposition established by Lo & Lo. Being a Privy Council decision from another jurisdiction on a provision that is materially similar to our written law, it must be given great weight. Here, I can do no better that to refer to the following passage in the judgment of Chang Min Tat FJ in Director General if *Inland Revenue v Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214; [1980] CLJU 141; [1980] 1 LNS 141:

> This court has down in *Khalid Panjang & Ors v Public Prosecutor (No 2)* [1964] MLJ 108; [1964] CLJU 60; [1964] 1 LNS 60 ; [1964] MLJ 108 the principle that a Privy Council decision on appeal from another country is binding on it and the other courts of this country if the appeal is on a provision of law in pari material with a provision of the local law. The decision is *lasala v Lasala* [1979] 2 All ER 1146, that the Privy Council would consider itself bound by a decision of the House of Lords must extend this principle to judgments of the House of Lords. Insofar as the decision of other courts in these and other countries are concerned, we have always treated these judgments as of only persuasive authority, but we have never lightly treated them or refused to follow them, unless we can successfully distinguish them or hold them as per incuriam. Other hand for these reasons, we should as a matter of judicial comity and for the orderly development of law, pay due and proper attention to them. (Emphasis added.)

In the second place, the fact that the appellant's employees did not actually receive the money in a given year does not matter. For, had any of those who were eligible to receive the benefit claimed it, then it would have been impossible for the appellant to have lawfully resisted the claim. The fact that the employees thought it fit not to make a claim but to defer it does not make the obligation to pay the expense that is incurred by the appellant non-existent. Accordingly it comes within what revenue lawyers commonly call 'the basket' in s 33.

In the third place, the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision: no tax. If there is any doubt then it must be resolved in the taxpayer's favour. See, *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339. The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.

See also *Fernrite Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2004] 7 MLJ 600.

[86] I am of the view that the cogent *ratio decidendi* in *Tune Insurance Berhad v Ketua Pengarah Hasil Dalam Negeri* is analogous and applicable to this appeal here as they both concern the insurance industry. It is also undisputed that the

commission expenses paid to generate the wakalah fee income here have been incurred by the taxpayer. There is therefore no material difference seen, so there is no reason not to apply the principles therein accordingly here.

See also *NV Alliance Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] 1 MLJ 441.

[87] Based on the principles of statutory interpretation in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* and purposive construction too as held in *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd* [2014] 2 MLJ 1; [2014] 3 CLJ 421 (FC), I am of the further view that if Legislature has intended to exclude s 33 of the ITA, this would have been specifically expressed in the ITA itself and in consonance with s 52 of Chapter 8 ITA that provides:

> 52 Modification of Part III in certain special cases
>
> In a case where any provision of this Chapter applies, the foregoing Chapters shall also apply but shall be modified in their application to the extent necessary to conform with that provision; and, if in that case there is any inconsistency between the provision and any provision of the foregoing Chapters, that provision of those Chapters shall be void to the extent of the inconsistency.

Thus, it is seen for example, amongst others, in s 60H(6) of the ITA and s 65E(12) of Chapter 8 of the ITA respectively as follows:

> Section 60H Closed-end fund company.
>
> (6) Sections 33 and 34 shall not apply to a closed-end fund company.
>
> Section 65E Gains or profits from the disposal of capital asset
>
> (12) Sections 33 and 34 shall not apply to gains or profits from disposal of capital asset.

[88] Upon my review, there is no such express exclusion seen in s 60AA of the ITA.

[89] It follows in my view the Revenue's contention that the provisions in s 60AA of the ITA overrides the general provision in s 33(1) of the ITA based on the principle *generalia specialibus non derogant* is fallacious.

[90] As to the insertion of s 60AA(9) of the ITA via the Finance Act 2013 also advanced by the Revenue in support of its contention, I am of the further view that this is merely to expressly put to rest the availability of the right of the taxpayer to treat commission expenses paid to generate the wakalah fee income

but not to add a right to the arguable non- availability of that right in the pre-amended s 60A of the ITA.

[91] Toward this end, I also rely on the following dicta of Gopal Sri Ram JCA (later FCJ) in *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428; [2005] 2 MLRA 335:

> In the third place, the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour. See, *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 1 MLRA 84; ; [1993] 4 CLJ 339 ; [1993] 2 AMR 3581. The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.

CONCLUSION

[92] For the foregoing reasons, there is merit in the taxpayer's appeal in Appeal 726.

[93] Consequently, I allow Appeal 726. My decision here also forms the primary basis as to why Appeal 746 must be dismissed *in limine*.

Appeals dismissed.

Reported by Nabilah Syahida Abdullah Salleh